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ABSTRACT

This paper presents arguments for a closer relationship between the American legal system and developmental research in such areas as attachment, the effects of early home environment, cognitive development, and the consequences of giving children decision-making power. It is suggested that greater knowledge in these areas would allow policy makers to better consider the consequences of laws concerning adoption, disposition of minors in divorce cases, child abuse or neglect, foster care, and parental rights. It is argued that too often judges and agency workers are forced to make decisions affecting the lives of children on the basis of intuition alone. Developmental psychologists are called upon to aid in making the juvenile justice system more sophisticated and more likely to serve the best interests of children. It is suggested that many courts and child welfare agencies would be willing to work with behavioral scientists in carrying out the needed research. (BRT)

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CHILD DEVELOPMENT AND PUBLIC POLICY: JUVENILE JUSTICE

Transcription of Speech Presented to the
Society for Research in Child Development Panel
Symposium, Denver, Colorado, April 12, 1975
by

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I want to thank you for the opportunity to talk here. I really do view it very much as an opportunity, since my talk here tonight is going to be an effort to proselytize you, to convince you that there are major policy issues connected with the way the legal system handles children which warrant your involvement and your guidance. I hope to identify areas of law with which you will want to become involved and to indicate research that is essential if the legal system is to make sound policy for the many children that come in contact with it.

My motivation is a personal one as well as a general one. I am currently working on a project for the American Bar Association which is designed to draft model standards for the entire juvenile justice system, standards that will serve as guidelines for all states. I am drafting a volume dealing with the legal system's response to children who are "neglected" or "dependent." I have been at this task for nearly four years, and I have found it in many respects virtually impossible to complete due to the widespread divergence of views about how children will be affected by various legal policies, by the absence of data on critical issues about child development, and by the substantial disagreement, as I read it, among development theorists on many of the issues I must confront. I will talk about some of these issues today.

The previous speaker has mentioned the need for prevention. Unfortunately, the legal system comes into play, for the most part, when prevention has failed and the situation is quite bad.

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The resources available to the legal system are quite mediocre and meagre, and these poor resources are made even worse by our lack of knowledge about sound policy. We may reach a time when we have better knowledge and when our society is willing to invest in preventive measures to better care for our children. However, I am somewhat less optimistic than others, and I see the legal system still having to pick up the pieces where prevention fails for a fairly long time ahead.

I shall describe later some of the areas where research is needed. First I would like to give you some idea of the reach of the legal system as it affects children and of some of the problems with the way the children are currently dealt with in the legal system.

To the extent that social policies ultimately get embodied in laws, virtually everything can be thought of as part of the legal system. For example, the fact that children have to go to school as a result of compulsory education laws is part of the way that the legal system deals with children. Similarly, when we set up laws that provide for Head Start programs, for health screening, for welfare systems: all that is part of the legal system. But I am not referring to this aspect of the legal system when I ask for your help. General laws embodying social policy are not my specific concern. Rather I am going to focus on areas where the legal system treats children in a very specific kind of way, what I will refer to as the "disposing" or "distributing" of children through the legal system.

Let me give you some idea of the areas in which this occurs and the magnitude of the current problem. Every single year the parents of several million children in this country get divorced. It is through the legal system that the rules for divorce are established and the rules for determining child custody are established. In as many as 20 percent of all cases there is a contest over how the children should be distributed at the end of a divorce proceeding. It is a judge who is given

authority and power to decide where we shall place the child when the parents cannot decide this themselves.

Every single year a million and a half children are brought into the legal system as delinquents for committing crimes, acts that would result in criminal prosecutions if they were adults. Another million and a half children are brought into the legal system as truants, beyond control of their parents, incorrigible, runaways, or in danger of leading an immoral or dissolute way of life. Obviously if we enforce that law to its extent, all children might be brought into the legal system. Fortunately, we show some restraint, perhaps due to the limited number of bed spaces we have to take the children that we bring into the system. The legal system tries to help these children. Judges try to help these children -- at least they claim to try and help these children. But as you undoubtedly all know, and may have experienced, the legal system often does a very bad job in this.

In addition, there are 150,000 children who are brought each year into the legal system as neglected or dependent. These are children who, it is assumed, are in families which fall so far below the minimum standards of care that the state has to intervene coercively to provide protection for them and to somehow try to better their well-being. Again, as I shall describe shortly, we don't do a very good job of that.

In addition, somewhere between 100,000 and 200,000 children are placed for adoption each year, and the legal system through adoption laws decides to whom these children should go. Finally, as you are all aware, there is a growing movement for a children's bill of rights, to give minors rights to request medical treatment, to establish child advocacy centers, all of which will bring children into the legal system in a very direct way.

In all of these areas social policy toward these children has to be developed. To a significant degree the legal system defines the child's place in society, and thereby reflects and

shapes society's views toward children. In many aspects of how we deal with children the legal system just makes guesses about what is the best kind of policy to embody in the laws. It is extremely troubling to anybody seeking to draft model legislation to discover how often there are just no data that can guide us in making policy decisions about how the law should treat children. Without data the legal system just acts blindly.

I teach a class of first year law students. On the first day of class each year, I tell them that it's probably not very important what they learn in law school, the amount of substantive knowledge that they get. I tell them that the essential skill of a lawyer in our society is to say authoritatively things they know nothing about. Lawyers do that extremely well. However, this skill is not as devious as it might first appear. It is true that lawyers sometimes talk without knowledge because they are ignoring existing knowledge from other disciplines, from developmental psychology, natural sciences, sociology, or other areas. However, all too frequently lawyers have to say something authoritatively without any knowledge because there are no data or no knowledge that can guide their decisions. Yet the decisions have to be made. We have to determine how children shall be distributed at the end of a divorce. We have to determine whether or not we are going to arrest children for committing offenses and what we're going to do with them. We have to determine who is going to be able to adopt children. We need standards for these and all the other issues I have mentioned. If we do not have the data, the research, or the knowledge, we must make decisions without it.

In order to indicate what knowledge we need, let me briefly describe some of the problems in the current handling of children, and then indicate some of the areas of research I believe are critical. I will try to cover a broad range of issues, somewhat superficially, since I hope in this talk to be able

to interest the greatest number of people possible in doing this kind of research, and I am told by my colleagues in psychology from Stanford that there is some diversity in research interests among psychologists.

One area I have mentioned is child custody. How do we distribute children who are the product of divorcing families? For the most part we let parents decide, and if they can come to an agreement about who should take care of the child, what are the visiting arrangements, what kind of child support should be established, whether or not support payments are to continue for a college education, etc., we leave that alone.

That may or may not be good for many children. But we see how hard it is to do anything else when we look at what happens when there's a contest. In contested cases the legal system tells judges, and the social work staff that often supports judges, to decide custody on the basis of the "best interests of the child." How does a judge determine what is the best interest of the child? Currently in the legal system these decisions are largely made on the basis of the judge's biases, own background, and folk psychology. For example, in a recent case in Iowa that has received a great deal of publicity, there was a custody dispute, not between two parents, but between a father and the child's grandparents. The child's natural mother died when the child was four. The father was unable to care for the child and asked the grandparents to care for the boy temporarily. When the boy was six the father asked for the child's return. The grandparents refused. The case went to a lower court in the state of Iowa and then to the Iowa Supreme Court. The Iowa Supreme Court had to decide what was in the best interests of children. They made the following decision, and I quote from the decision: "The father was an artist who was also a member of the ACLU and had lived in a number of different cities and worked for various newspapers. The father's home would be unstable, unconventional, arty,

bohemian, and probably intellectually stimulating. The grandparents provided stable, dependable, conventional, middle class, midwest background. We believe security and stability in the home are more important than intellectual stimulation in the proper development of the child." This was their folk psychology.

You may agree or disagree with that conclusion of the court. The critical issue is whether developmental psychology provides us with data for answering such questions. What criteria does it offer to determine the child's best interest? At least the judges here attempted to use psychology. Often the standards are worse. For example, most courts refuse to give custody to an adulterous mother, even if the mother is the only person who has ever cared for a child two or three years old and the father admits that child care will be handled by housekeepers if he gets custody. In fact, the mother may even be denied visitation. Morality, sex life, dirty home conditions are often the things judges look at in the absence of data giving better guidance.

How can we do better? Three prominent people in the field of behavioral science and law, Joseph Goldstein at Yale Law School, Dr. Anna Freud, and Dr. Albert Solnit at Yale Medical School, recently proposed in a book that has gotten a great deal of publicity that the child be given to the parent who is the "psychological" parent of the child. Regrettably, the book doesn't tell us how to identify the psychological parent of the child. Do we have ways of measuring this? Moreover, the authors argue that when there is no psychological parent, or when both parents serve as psychological parent, we are to flip a coin to decide who gets custody. This may be the best, if not the most aesthetic, policy that the legal system could develop. But perhaps research could give us some better answers to some of these questions.

There are other important research areas regarding divorce. I heard today a speech by Dr. Heatherington, which was a very

interesting speech on children and divorce, describing some of the impacts of divorce. She described the kind of disruption that is involved from a divorce and the negative consequences for the children. It made me think about states which have passed laws requiring counseling before people obtain a divorce. Such counseling is provided not necessarily to keep the people together, but to prepare them for the problems that lie ahead after a divorce. We know very little about whether such counseling services work, whether they alleviate the problems faced by children who are parties to a divorce, or whether they alleviate the problems that adults face. Yet this type of research is essential to develop sound legal policy in this area.

A second area I have mentioned is that of child neglect. It is the area ~~that I am most~~ deeply involved in and most aware of. Under all state laws coercive intervention is currently justified to protect children if parents are thought to be neglecting or abusing them. However, the terms neglect and abuse are never very specifically defined. Instead, the statutes allow coercive state intervention where a home is "unfit, unsuitable, or where the parents are immoral, depraved, or failing to provide adequate supervision." As a result, much state intervention occurs in a manner directly contrary to what we know about child psychology. Intervention often reflects cultural biases and moral value judgments embodied in the legal system.

For example, to give you another horror story -- the horror stories point out the worst points of the legal system, but much that happens day to day is almost as bad -- recently a court in California decided to remove two children from their family, and place them in foster homes. The children were 9 and 7. They lived with their natural mother and a man who had entered a consensual union with the mother six years earlier. The union was stable, and the man was viewed as the father by

the children. Both children were doing very well in school and were well adjusted and happy according to a social work report. However, the court decided that because the parents were not legally married, growing up in such an immoral environment would undoubtedly lead the children to immoral adult behavior. Therefore, it ordered that the two children be moved into foster homes. Fortunately, the case was later reversed and the children were returned home. However, the average appeal in the legal system in cases involving children takes between 18 months and 2 years, so that if something is done wrong at the trial level, the child will suffer for a long period of time.

Again, this case isn't typical. However, many children are labeled neglected by judges who reflect the same kind of bias and the same lack of knowledge evidenced in this case. Even more importantly, there are no data available to tell the well meaning judge when a family has reached a level of sufficiently poor functioning so that we can decide that this family should not have a child.

The legal system is also failing neglected children after they are removed from their homes. Many children who are removed have to remain in institutions for brief periods of time. Sometimes they remain there for as long as a year. In one of the counties near Stanford, a county which is thought to be progressive with a good probation department, there is a children's shelter for these children. This shelter is physically very, very nice. Anybody who went to visit it would think this is a good place to care for children. However, the person who has run that children's shelter for years believes that because all of the children who come into the shelter will eventually go home to their parents, or will be placed in foster care, that the children should not develop any attachment relationships, because these will be broken later on and that it is bad to develop strong attachments which will later be disturbed. This policy is followed regardless of the child's

age or length of stay. Accordingly, the shelter turned down an offer by a group of senior citizens to provide foster grandparents, who would come in every day and provide continuous care and affection to individual children, because this would establish such an attachment relationship.

Many other welfare or probation departments refuse to allow parents to visit children in placement because they say it makes the placement more difficult. I think there is good reason to suspect from theoretical work in child psychology that these positions are faulty. But without research, without data, we cannot get such policies changed.

I will mention one further aspect of the treatment of neglected children. Many children who are removed from their homes stay in foster homes for years, some until their majority. Studies show that as many as 50% to 80% of the children in placement are never returned home. Yet the legal system has always been reluctant to terminate parental rights. We do not have standards for determining when to terminate parental rights, or data on the impact on the child of terminating parental rights. Without more data legislators are reluctant to liberalize termination laws, believing parental rights inviolate.

There are many other problems with the ways laws are drafted or implemented that I could mention, but because of time I will not go through them at this point. I would like to turn instead to some of the areas of research that I see a critical need for people here to be doing. I have been told by some of my colleagues in psychology at Stanford that there is some concern over theory in this group, that not everyone is policy oriented. In fact, some may believe that there is some conflict between theoretical research and policy-oriented research. I am not experienced enough to evaluate that issue completely, but I can say that, in my limited experience, there is no such conflict. Therefore, I have tried, in choosing research areas,

to pick some which I believe are closely related to the traditional and current concerns of child development theory. It is my contention that, at least in these areas, just a change in the focus of the research will produce important theoretical as well as policy implications.

One area that seems important in child development theory is the issue of attachment. It is also a question of great interest to the legal system. In fact, there is a critical need in the legal system for further development of the theoretical and empirical knowledge about attachment if we are to determine the appropriate policy towards neglected children. Lawyers are aware that there is evidence that separation is traumatic for children, and we should try to avoid breaking attachments. But is this true where the child's home is very bad? Are beaten children, rejected children, attached to their parents, and if so, should we worry about breaking these attachments? Is there a difference in the nature and the quality and implications of an attachment of a child who is from an abusing family and other kinds of attachments that you are concerned with? How bad must a home situation be before we decide it is worthwhile to take the risks of breaking an attachment relationship?

In addition, over 300,000 children are currently in foster care, placed there either by courts or by their parents. We know little about what is the impact of the separation on these children. We do not know whether the impact varies if a child is placed with relatives instead of in foster homes, if teenagers are placed in group homes instead of foster homes, or if we use institutions instead of homes. We know little about how the children can be best prepared for such separations, although the research by the Robertsons in England gives some ideas of what procedures we ought to follow.

We also need to know what is the relationship of attachment to visitation when children are in placement. Are the social

workers who claim that allowing visitation will disrupt the transition of the child, and thereby impair the possibility of eventual return home, correct? Under what kinds of conditions do we want to allow visitation? Does this vary by age, reason for placement, or other factors?

Perhaps the most difficult questions concern the relationship of attachment to termination of parental rights. It is clear that when children are removed from their homes, they remain out of home for a long period of time. Some are subjected to numerous moves from one foster home to another. There is increasing pressure in the legal system to liberalize, or make easier, the termination of parental rights and the eventual adoption or permanent placement of these children. However, we know very little about when it is in the child's interests to have parental rights terminated. If a child is out of home, should there be varying periods of time depending on the age of the child, at which point parents could not reclaim the child? Should we have different laws dealing with six-month-old children in placement, two-year-old children in placement, five-year-old children in placement, ten-year-old children in placement? Currently the law treats all children alike, no matter what their age. How can we build in developmental knowledge to make the laws more sophisticated and more likely to serve the best interests of children?

Many other questions are relevant to the termination decision. What kind of attachment does a child in foster care retain with the natural parents? In what period does this attachment transfer from one set of custodians to another? Again, the Goldstein-Freud-Solnit book talks in terms of psychological parent. But do we know under what kinds of conditions a child changes its attachment from the natural parent to a foster parent that the child is living with? Does it vary with the child's age? With previous care? These are just some of the many questions regarding attachment directly relevant

to legal policymaking.

I would like to cover at least two other areas with my remaining time. There is a great deal of concern in child development research over early home environment. In particular there has been concern over the impact of early home environment on the development of cognitive skills. The impact of home environments is also critical to determinations of when a child is neglected. There has been increasing pressure on the legal system to recognize and to incorporate into the law the fact that children can be emotionally as well as physically neglected. But how do we define emotional neglect? How do we know when a home environment is so poor that even though the child is not physically beaten, coercive state intervention is necessary to protect the child? How do we measure the impact of home environment other than on cognition?

These are difficult drafting issues if one is trying to write legal standards. All such standards are applied by judges and social workers who rarely have the training to make these decisions on a sophisticated case-by-case basis. We are not going to have available sophisticated clinicians to do this for the forseeable future. Therefore, I believe we need as specific rules as possible. Currently such rules are made up by lawyers and by legislators who are primarily lawyers. If we are to get better rules, developmental psychologists must participate with lawyers in facing the hard questions involved in drafting a specific statute. They must be willing to apply existing data to help define those conditions that justify state intervention. Moreover, we need much more research to provide additional guidance on these questions.

We also lack data to guide judges and child care workers who have to decide how to treat a neglected child. When should we intervene by providing a homemaker to the family; when do we intervene by providing day care services; and when do we intervene by removing the child from the home and placing her in a

foster care setting or an institution? Right now I can tell you from substantial experience, we make those decisions in one of two ways. Either the community has only one or two resources available, and so the decision is made by default, or if there are three or four alternatives available, the social workers and the judges throw darts at a dart board, and whatever comes up, whatever their intuition tells them to do, they do. It is not on the basis of data; I am sure of that.

One final area that seems to be of concern to child development is the area of cognitive development and maturity of children. There is substantial research and theory on the growth of cognitive development at different ages. This research is again extremely relevant to the legal system. You are all aware of the increased concern over children's rights. Children's rights means inevitably children's participation. What do we know of the child's ability to participate meaningfully in a legal proceeding? For example, there are now various state laws giving a child of different ages, sometimes 10, sometimes 12, sometimes 14, the right to be heard in a divorce proceeding. Some states allow children to decide which parent they will live with. At what age, if any, should we give the child the right to determine who they are going to live with? What are the implications to the child of being asked to make this kind of decision? With regard to termination of parental rights, at what age, if any, should we give the child the right to say I want to live with somebody else than my parents, and that parental rights should be terminated; or that I don't want to live with somebody else than my parents, and their rights shouldn't be terminated? How shall we get this information from children if we give them a voice in the legal system? There are many other issues involving a child's cognitive and emotional decision-making capacity which the legal system now faces. Children are being given the right to request abortions and to obtain medical care, and to use birth control without parental permission. We need guidance as to

at what ages children should be given such rights, and what are the consequences of giving children this power.

For the last eight years, in addition to teaching I have represented children in court in a variety of proceedings, from murder charges to neglect and dependency hearings. I have represented children of all different ages. I have often wondered what it meant for me to go up to a nine year old or a ten year old and say, "I'm your lawyer. Here I am; tell me what to do; what do you want me to do in representing you?" What does the child think of me; what does he think of legal rights; what is the impact of all of this on the child? What are the long-term consequences of being told you have a lawyer, you have rights, and we are going to defend them in court? Does this give children a sense of self-esteem, of controlling their own fate, a sense of powerfulness; or does it leave them bewildered? How are children different who have gone through such proceedings? Do they get respect for authority? Do they get disrespect for authority?

There are many other issues I could cover, but time precludes me from doing so. I would like to conclude by discussing the possibility of doing such research. Such research has already begun in some areas. I have mentioned the area of early home environment. The treatment of delinquency is another area. We have had substantial research on the impact of behavior modification, transactional analysis, and numerous other, if I may say, fads that have come into the treatment of delinquents. We need more research in this area, but it has begun. We also have research looking at the causes and the cures of child abuse. It's just a small amount, but a beginning.

However, when I reviewed the program for the four days, there were very few symposia that seem to have direct policy-related issues. In particular, there are very few that deal with problems of adolescents, who are a major group at risk in the legal system. None focus on neglect or abuse.

This is work that can be done. There are many lawyers who are anxious to work with behavioral scientists in framing the questions and doing the research. Local courts and child welfare agencies often provide ideal research settings. I mentioned that some probation departments do not allow visitation for children. One such department has expressed a willingness to set up a random study where half of the children would receive intensive visitation and the other half would continue their old policy to see what difference that makes. Courts are also willing to assign children to programs on a random basis. Many judges recognize that they do not know what they're doing, and they are willing to experiment because they know they can't do any worse than they are currently doing. Moreover, given the haphazard nature of the way we treat most children in the legal system, we have natural field experiments with random distribution of children in treatment programs all over the place, just because of deficiencies in the existing system.

In preparing for this talk, and in preparing for my work on the Juvenile Justice Standards Project, I have read a good deal of the history of the legal system's dealing with children. I have reviewed each of the White House Conferences on Children from 1909 to 1970. The most disturbing fact about reading all of these reports is that they all repeat the same issues. They all have the same questions; they all repeat the same failures in the way our system treats children. To a tremendously disturbing degree little has changed between 1875 and 1975 in our treatment of children. And I am convinced that without active participation by the people here, little will have changed by 2075.